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AMINAH AHMAD (MENYAMAN ATAS KAPASITI PERIBADINYA DAN BAGI PIHAK 56 PESARA PERKHIDMATAN AWAM) v. KERAJAAN MALAYSIA & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-15-01-2024]
16 JANUARY 2025

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Abstract – *Pension adjustments under the Pensions Adjustment Act 1980 are linked to salary revisions for serving Government employees. When serving Government employees receive a salary revision, pensioners are also entitled to a corresponding adjustment to their pensions. Service circulars are evidence to determine whether salary revisions have occurred. Mere enhancements or restructuring of salary scales, without actual salary increases, do not constitute salary revisions for pension adjustment purposes. A clear and unconditional salary adjustment, however, in this case a 'Kenaikan Gaji Tahunan (KGT)', constitutes a salary revision that triggers corresponding pension adjustments.*

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ADMINISTRATIVE LAW: *Judicial review – Challenge against decision of Public Service Department – Pensions – Pensions regulated by Pensions Act 1951 and Pensions Adjustment Act 1980 amended by Pensions Adjustment (Amendment) Act 2013 – Amending Act changed pensions adjustment formulas – Changes affected those retired before 1 January 2013 – Impugned amendments resulted in situation less favourable to pensioners when compared with preceding retirement adjustment scheme – Demand by pensioners that retired before 1 January 2013 for pensions adjustments and payment of arrears – Pensions reverted to December 2012 – Whether there could be retrospective adjustments – Whether adjustment could be made without salary scale changes – Whether service circulars showed that salary revisions occurred – Whether judicial review sought abuse of process – Whether there was res judicata*

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ADMINISTRATIVE LAW: *Public servants – Pensions – Pensions regulated by Pensions Act 1951 and Pensions Adjustment Act 1980 amended by Pensions Adjustment (Amendment) Act 2013 – Amending Act changed pensions adjustment formulas – Changes affected those retired before 1 January 2013 – Impugned amendments resulted in situation less favourable to pensioners when compared with preceding retirement adjustment scheme – Demand by pensioners that retired before 1 January 2013 for pension adjustments and payment of arrears – Pensions reverted to December 2012 – Whether there could be retrospective adjustments – Whether adjustment could be made without salary scale changes – Whether service circulars showed that salary revisions occurred*

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The pensions received by Government employees who had retired from public service was regulated by the Pensions Act 1951 and the Pensions Adjustment Act 1980 ('PAA 1980'). In 2013, the PAA 1980 was amended by ss. 3 and 7 of the Pensions Adjustment (Amendment) Act 2013 ('PAAA 2013'). The amendment deleted ss. 3 and 6 and the definition of 'corresponding last drawn salary' in s. 2 of the PAA 1980. Two new sections were introduced, namely, ss. 3A and 3B of the PAA 1980. The above amendments came into effect on 1 January 2013 and the direct effect of the amendments resulted in the change in the formula in adjusting the pensions of Government employees who had retired prior to 1 January 2013. Aminah Ahmad, a pensioner who retired from public service in 2002, sued the Government of Malaysia and the Director General of Public Service in her personal capacity and on behalf of 58 retired members of the public service ('applicant'). In 2017, the applicant filed an originating summons ('OS'), seeking (i) declaratory orders that: (a) ss. 3 and 7 of the PAAA 2013 were *ultra vires* art. 147 of the Federal Constitution; and (b) the deleted ss. 3 and 6 of the PAA 1980 be restored accordingly; and (ii) a consequential order that adjustments be made retrospectively to the pensions received by the recipients whose pensions had been calculated based on the post-1 January 2013 formula and any shortfall resulting therefrom be paid to the respective recipients accordingly ('2017 OS'). The High Court dismissed the 2017 OS. The High Court's decision, however, was reversed by the Court of Appeal. The Court of Appeal: (i) opined that the impugned amendments resulted in a situation less favourable to the applicant when compared with the preceding retirement adjustment scheme under the PAA 1980; (ii) granted the declaratory orders sought by the applicant in the 2017 OS and ordered that the declarations were to take effect prospectively from the date of the Court of Appeal's decision, *ie*, 14 January 2022; (iii) declined to make any order for retrospective adjustments to be made to pensions paid and for any shortfall to be paid to the applicant on the ground that it had not been proven that any actual loss had been suffered by the applicant. The respondents were granted leave by the Federal Court to appeal against the decision of the Court of Appeal. The decision of the Federal Court was to take effect that the applicant obtained a declaration of right against the respondents that she was entitled to receive her pensions according to the formula in the original ss. 3 and 6 of the PAA 1980. Pursuant to the decision of the Federal Court, the applicant, wrote to the Minister in the Prime Minister's Department in charge of Law and Institutional Reform, demanding that the respondents carry out the pensions adjustment using the pre-2013 formula from 13 January 2022. A similar letter was also sent to the respondents. The second respondent responded by stating that: (i) the court decisions did not make any order for retrospective adjustments and for any shortfall to be paid; (ii) according to the revived provisions and the definition of 'current salary scale' in the PAA 1980, the pensions adjusted prior to 1 January 2013 was

premised on changes in any salary scale and since there was no change in the current salary scale from 2013, no pensions adjustments could be made; and (iii) since the applicant fell within the category of officers who retired prior to 2013, their pensions were reverted to the amount as per December 2012 based on the last salary revision for public servants implemented in 2012 ('letter dated 17 October 2023'). This last salary revision for serving public servants was reflected in Pekeliling Perkhidmatan Bil. 1 Tahun 2012. The applicant responded by: (i) stating that the order for a back-dated pensions was not an issue and that adjustment to the pensions ought to be made from the date the original provisions were revived; and (ii) refuting the claim by the second respondent that there was no salary revision and referred to the following service circulars which would entitled the applicant to pensions adjustments: (a) Pekeliling Perkhidmatan Bil. 1 Tahun 2012; (b) Pekeliling Perkhidmatan Bil. 2 Tahun 2013; (c) Pekeliling Perkhidmatan Bil. 36 Tahun 2013; and (d) Pekeliling Perkhidmatan Bil. 1 Tahun 2016. In his reply, the second respondent maintained the position taken in his letter dated 17 October 2023. Hence, the present judicial review application by the applicant for orders of *mandamus* which read as follows: (i) to adjust entitlement amounts in accordance with the formula contained in ss. 3 and 6 of the PAA 1980 prior to its amendments under ss. 3 and 7 of the PAAA 2013; and (ii) within 14 days or such time as the court may determine, execute the payment of pensions arrears in favour of the applicant, in accordance with the formula contained in ss. 3 and 6 of the PAA 1980 prior to its amendment under ss. 3 and 7 of the PAAA 2013. The respondents argued that, *inter alia*, the instant judicial review proceeding was an abuse of the process of court since it was caught by *res judicata* as the applicant was seeking the same order that the Court of Appeal declined to make, *ie*, to make the requisite adjustment and payment of pensions arrears.

Held (granting orders of *mandamus*):

(1) The matter was not *res judicata* for the following reasons: (i) the main relief sought in the 2017 OS was the validity or constitutionality of ss. 3 and 7 of the PAAA 2013. The relief of the Court of Appeal declined to make was the retrospective adjustments and shortfall which was said not proven by the applicant. What was not proven was whether there was an actual loss in pensions after the impugned amendments for the main relief to be granted. The High Court nor the Court of Appeal had made a finding on the actual pensions adjustments of the applicant; (ii) in the 2017 OS, *mandamus* was not an issue nor was it determined by the courts. The present issue was whether *mandamus* was a point which properly belonged to the subject of litigation and which the applicants, exercising reasonable diligence, might have brought in the 2017 OS; and (iii) it was clear as day that the criteria for claiming the remedy of *mandamus* had not materialised at the time the 2017 OS was

brought. At that time, the amendments *vide* ss. 3 and 7 of the PAAA 2013 were yet to be declared invalid. It was only after the said amendments were declared invalid and the original provisions were restored that the applicant could make a demand to the second respondent to make the necessary adjustments to her pensions. It was only when the second respondent refused to do so that the criteria for seeking the remedy for *mandamus* crystallised. Therefore, it was not competent for the applicants to seek the remedy of *mandamus* in the 2017 OS. The remedy was then not available to the applicant. In the circumstances, the instant judicial review application was not an abuse of the process of the court and the applicant was entitled to claim the remedy of *mandamus*. (paras 30-33)

(2) The enabling statute for adjustment of pensions was the PAA 1980 and not the service circulars. However, the only evidence of whether there was or there was not a salary revision would be the service circulars which would reveal whether there was or there was not a salary revision of serving Government employees. Pekeliling Perkhidmatan Bil. 2 Tahun 2013 and Pekeliling Perkhidmatan Bil. 36 Tahun 2013 were an enhancement of the structure of the salary scale without altering the salary that was being paid to a serving Government employee. There was merely an enlargement of the Jadual Gaji Minimum Maksimum ('JGMM'), among other improvements, none of which gave rise to a salary revision. Therefore, the reliance on these two service circulars by the applicant was misconceived in law. However, Pekeliling Perkhidmatan Bil. Tahun 2016 did not only concern improvements carried out towards the schemes of service. Hidden amongst all the various improvements and enhancements was a present by the Government to serving Government employees of a salary adjustment in the following words 'Pegawai awam turut menerima faedah pemindahan gaji bersamaan satu (1) Kenaikan Gaji Tahunan (KGT) kecuali yang terlibat dalam pemindahan ke gaji permulaan yang baharu di JGMM baharu'. The words 'menerima faedah pemindahan gaji bersamaan satu (1) Kenaikan Gaji Tahunan (KGT)' was not dependant on the decision of the Human Resource Development Panel or on work performance. The one KGT was given without conditions and was, for all intents and purposes, a revision of salary. When serving Government employees received such an adjustment of salary, it was inconceivable that pensioners were not accorded a corresponding adjustment so as to increase their pensions. (paras 51-54)

(3) An order of *mandamus* was granted compelling the second respondent to make the necessary corresponding adjustments of one KGT for the purpose of computing the pensions in favour of entitled pensioners under ss. 3 and 6 of the PAA 1980. In view of the decision of the Federal

Court in *The Government Of Malaysia & Anor v. Aminah Ahmad*, the back-dated pensions were to be paid beginning January 2022 until the next salary revision. The payment of the back-dated pensions was to be paid to the entitled pensioners within three months from today. (para 56)

Case(s) referred to:

Chemfert Sdn Bhd & Anor v. Lim Hua [2010] 7 CLJ 491 CA ***(refd)***

Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

The Government Of Malaysia & Anor v. Aminah Ahmad [2023] 8 CLJ 1 FC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 4(1), 5(1), 8(1), 147

Pensions Adjustment (Amendment) Act 2013, ss. 3(1), (2), 7

Pensions Adjustment Act 1980, ss. 2, 3, 3A, 3B, 6(2)

For the applicant - Abd Shukor Ahmad, Baljit Singh, Gurpreet Kaur Pannu Karam Singh & Aaron Aiman Thangarajoo; M/s Shukor, Baljit & Partners

For the 1st & 2nd respondents - Kogilambigai Muthusamy; FC

Reported by Najib Tamby

JUDGMENT

Amarjeet Singh Serjit Singh J:

The Application

[1] On 29 February 2024, I had granted the applicant leave to commence judicial review proceedings against the Government of Malaysia ("the Government") and the Director General of Public Services ("the Director General") for orders of *mandamus* which read as follows:

(i) to adjust the pension entitlement amounts in accordance with the formula contained in ss. 3 and 6 of the Pensions Adjustment Act 1980 ("PAA 1980") prior to its amendment under ss. 3 and 7 of the Pensions Adjustment (Amendment) Act 2013 ("the 2013 Amendment Act"); and

(ii) within 14 days or such time as this Honourable Court may determine, execute the payment of pension arrears ("the pension arrears") in favour of the applicant in accordance with the formula contained in ss. 3 and 6 of the PAA 1980 prior to its amendment under ss. 3 and 7 of the 2013 Amendment Act.

The Background

[2] Aminah binti Ahmad is a pensioner. She retired from public service in 2002. In the instant judicial review proceeding, she is suing the Government and the Director General for the abovementioned reliefs in her personal capacity and on behalf of 58 retired members of the public service ("the applicant"). The Director General is the authority empowered under the PAA 1980 to determine the calculation of pension on behalf of the Government.

[3] The pension received by Government employees who had retired from public service is regulated by the Pensions Act 1951 and the PAA 1980. In 2013, the PAA 1980 was amended by ss. 3 and 7 of the 2013 Amendment Act. The amendment deleted ss. 3 and 6 and the definition of "corresponding last drawn salary" in s. 2 of the PAA 1980. Two new sections were introduced, namely, ss. 3A and 3B of the PAA 1980 respectively. The above amendments came into effect on 1 January 2013. The direct effect of the amendment resulted in the change in the formula in adjusting the pension of Government employees who had retired prior to 1 January 2013.

[4] Some four years later, on 28 April 2017, the applicant filed an originating summons ("the 2017 originating summons") praying in the main for the following declaratory orders:

(i) that ss. 3 and 7 of the 2013 Amendment Act are *ultra vires* art. 147 of the Federal Constitution;

(ii) that the deleted ss. 3 and 6 of the PAA 1980 be restored accordingly; and

a consequential order that adjustments be made retrospectively to the pensions received by the recipients whose pensions had been calculated based on the post 1 January 2013 formula and any shortfall resulting therefrom be paid to the respective recipients accordingly.

[5] The applicant's case, in a nutshell, was that the amendments made by the 2013 Amendment Act were less favourable than the position prior to the amendments made to the PAA 1980. On the restoration of the deleted ss. 3 and 6 the applicant sought adjustments of the pension under the pre-2013 formula and be paid to her.

[6] On 9 January 2020, the High Court dismissed the declarations sought by the applicant. In deciding so, the High Court made, *inter alia*, the following observations and findings:

(i) section 3(1) as amended by the 2013 Amendment Act changed the criteria by which pension is adjusted under the PAA 1980. It changed the statutory mechanism for the adjustment of pension from one that is based on the latest revision of an applicable salary scale to an adjustment mechanism that is based on a fixed rate of increment of 2% per annum;

(ii) Parliament was aware that the amendments made would change the variable rate of pension adjustment pegged to the latest revision of the applicable salary scale to a fixed rate adjustment of 2% per annum, which could result in pensioners being put in a position that is less favourable than that prior to the amendments coming into effect;

(iii) to ensure that the guarantee provided in art. 147 of the Federal Constitution is preserved and to protect against the likelihood of situations where pensioners are put in a less favourable position because of the change to the annual fixed rate pension adjustment, Parliament had provided a safeguard in s. 3(2) of the PAA. The safeguard caters for the event that where the fixed rate of 2% results in a situation that is less favourable by providing a provision empowering His Majesty the Yang Di-Pertuan Agong to prescribe a higher percentage of increment to an officer appointed before 1 January 2013; and

(iv) Sections 3 and 7 of the 2013 Amendment Act is not *ultra vires* art. 147 of the Federal Constitution.

[7] The applicant by notice of appeal dated 3 February 2020 appealed against the whole decision of the High Court. The Court of Appeal in its judgment dated 14 January 2022 opened by stating that the appeal concerned the validity of the amendments made to the PAA 1980. The Court of Appeal concluded by reversing the decision of the High Court after holding that the impugned amendments resulted in a situation "less favourable" to the applicant when compared with the preceding retirement adjustment scheme under the PAA 1980, *ie*, the scheme prior to the amendments.

[8] The Court of Appeal allowed the appeal and granted the following declarations which the court said were not inconsistent with the actual declarations sought by the applicants in the 2017 originating summons:

(i) that ss. 3 and 7 of the 2013 Amendment Act are null and void being in contravention of art. 147 of the Federal Constitution;

(ii) that ss. 3 and 6 of the PAA 1980 as amended by ss. 3 and 7 of the 2013 Amendment Act and in force since 1 January 2013 are null and void being in contravention of art. 147 of the Federal Constitution; and

an order that the above declarations are to take effect prospectively from the date of the Court of Appeal's decision, *ie*, 14 January 2022.

[9] The Court of Appeal, however, declined to make any order for retrospective adjustments to be made to pensions paid and for any shortfall to be paid to the appellant on the ground that it has not been proven that any actual loss has been suffered by the appellant.

[10] The Government and the Director General were granted leave by the Federal Court to appeal against the decision of the Court of Appeal. The following questions for determination by the Federal Court were determined as follows:

(i) the question of whether ss. 3 and 6 of the PAA 1980 as amended by ss. 3 and 7 of the 2013 Amendment Act contravene art. 147 of the Federal Constitution when a pensioner fails to prove that the adjusted pension received is actually financially less favourable when it is compared to the former law was answered in the affirmative;

(ii) the question of whether: (a) the pre-amendment law is revived by itself with the striking down of the impugned provisions by the court; and (b) if the answer to question (a) is in the affirmative, whether the schedule to the pre-amendment law which has been deleted by Parliament with the coming into effect of the impugned provision, is likewise revived automatically, were both answered in the affirmative.

[11] The decision of the Federal Court was to the effect that the applicant obtained a declaration of right against the Government and the Director General that she is entitled to receive her pension according to the formula in the original ss. 3 and 6 of the PAA 1980.

Events Leading To The Instant Judicial Review Application

[12] Pursuant to the decision of the Federal Court, the applicant in the letter dated 6 October 2023, to the Minister in the Prime Minister's Department in charge of Law and Institutional Reform, demanded that the Government and the Director General carry out the pension adjustment using the pre-2013 formula from 13 January 2022. A similar letter, dated the same day was also sent to the Director General and Chief Secretary to the Government.

[13] On 17 October 2023, the Director General responded stating, *inter alia,* as follows:

(i) the court decisions did not make any order for retrospective adjustments and for any shortfall to be paid. Paragraph [49] of the judgment of the Court of Appeal was referred which stated:

> We however, decline to make any order for retrospective adjustments to be made to pensions paid and for any shortfall to be paid to the appellant on the ground that it has not been proven that any actual loss has been suffered by the appellant. This was the finding of fact by the learned judge and in respect of which we find no appealable error.

(ii) according to the revived provisions and the definition of "current salary scale" in PAA 1980 the pension adjusted prior to 1 January 2013 is premised on changes in any salary scale and since there was no change in the current salary scale from the year 2013, no pension adjustments can be made; and

(iii) since the applicants fall within the category of officers who retired prior to 2013, their pension is reverted to the amount as per December 2012 based on the last salary revision for public servants implemented in 2012.

[14] This last salary revision for serving public servants is reflected in Pekeliling Perkhidmatan Bil. 1 Tahun 2012.

[15] The applicant responded stating that the order for a back dated pension is not an issue and that adjustment to the pension ought to be made from the date the original provisions were revived. The applicant also refuted the claim by the Director General that there was no salary revision and referred to the following service circulars which would entitle the applicants to pension adjustments:

(i) Pekeliling Perkhidmatan Bil. 1 Tahun 2012;

(ii) Pekeliling Perkhidmatan Bil. 2 Tahun 2013;

(iii) Pekeliling Perkhidmatan Bil. 36 Tahun 2013; and

(iv) Pekeliling Perhkidmatan Bil. 1 Tahun 2016.

[16] The applicant contended that the said service circulars had made changes to the salary scale although the words improvements or rationalisation are used. However, in a letter dated 12 December 2023, the Director General maintained the position taken in his letter dated 17 October 2023.

Analysis And Decision

[17] The instant judicial review is brought to adjust the pension based on the formula contained in ss. 3 and 6 of the PAA 1980 after the Federal Court revived the said sections. Under the said sections, pensions were adjusted whenever there was a salary revision for serving Government employees. As alluded to above, the Government and the Director General refused to make any adjustments on the basis that there was no salary revision after 2012 as evidenced in Pekeliling Perkhidmatan Bil. 1 Tahun 2012.

[18] To appreciate the arguments made by the parties, it is pertinent that the relevant provisions of the PAA 1980 are reproduced. First, s. 3 of the PAA 1980 which reads as follows:

(i) pensions and other benefits granted to officers and their dependants under any written law before or on the implementation of any **current salary scale** shall be adjusted in accordance with the provisions of this Act and shall be paid or be payable with effect from the date of implementation of the current salary scale.

(ii) the pension or retiring allowance of an officer shall be adjusted as provided in the **First Schedule**. (emphasis added)

[19] Second, s. 2 of the PAA 1980 which provides the definition of "current salary scale" in the following terms (emphasis added):

> The latest scale which is, on or after the coming into force of this Act, applicable to officers of the public service and employees of statutory and local authorities to whom the revision of salaries made by the Federal Government with effect from 1 January 1976, **or any other subsequent revision thereof made by the Federal Government from time to time**, is applicable.

[20] The relevant portion of the First Schedule provides for an "adjustment formula for service pension" in the following manner: 1/600 x number of months of reckonable service (subject to no more than 360 months) x corresponding last drawn salary.

[21] Third, the words "corresponding last drawn salary" is defined in s. 6(2) of the PAA 1980 as follows:

> For the purposes of this Act, "corresponding last drawn salary" means, in the case of an officer to whom the current salary scale does not apply by virtue of:
>
> (a) his not having had an opportunity to opt;
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> (b) his not having opted; or
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> (c) his not being deemed to have opted,
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> for the current salary scale, *the equivalent salary that the officer would have drawn under the current salary scale prior to death* in service or to *retirement had he been in service on the implementation of the current salary scale and had it been applied to him.* (emphasis added)

Grounds Of Review

[22] The applicant was of a different view than the view that was held by the Government and Director General. The applicant contended that there were, in fact, salary revisions as shown in the abovementioned service circulars while the Government and Director General said that the said service circulars concerned improvements and did not apply to pensioners. The Government and Director General refused to accede to the demand of the applicant and hence the instant judicial review application for the said orders of *mandamus*.

[23] The grounds for review raised by the applicant in her statement in support of the reliefs sought are as follows:

(i) the failure to make the adjustments to the pension pursuant to the service circulars was unlawful, unconstitutional, and contrary to arts. 4(1), 5(1), and 8(1) of the Federal Constitution; and

(ii) the decision not making the adjustments to the applicant's pension was irrational in that no reasonable decision-maker similarly circumstanced would have made such a decision, given that, the Federal Court had held that all pension payments are to be adjusted based on the pre-2013 formula.

Submission Of The Government And The Director General

[24] The Government and the Director General opposed the instant judicial review application on the following grounds:

(i) the judicial review application is an abuse of the process of the court as it is caught by the principle of *res judicata* and issue estoppel; and

(ii) the refusal to carry out upward pension adjustment as demanded by the applicant is lawful, constitutional, and rational.

Law On The Order Of Mandamus

[25] Since the main order sought by the applicant is an order of *mandamus*, this court is therefore only concerned with whether the criteria for such an order to be made has been satisfied. An order of *mandamus* is granted by the High Court when there is a legal duty imposed on an authority and the applicant has a legal right to compel the performance of that legal duty. The duty is prescribed by law, and the remedy is available against a public officer to ensure that the public officer does his duty according to law. What is enforced through an order of *mandamus* is a duty of a public nature the performance of which is imperative and not optional or discretionary. In other words, if the public officer is conferred statutory power which requires an exercise of discretion, then an order of *mandamus* cannot lie. (see *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123).

[26] As such, any non-payment of a pension pursuant to a salary revision is a breach of duty imposed by the PAA 1980. In the instant case, the only issue before me was whether there was a salary revision after 2012 as claimed by the applicant. If there was, the Director General was under a duty to adjust her pension and if, there was no salary revision, then the applicant is not entitled to any adjustment.

Res Judicata

[27] The issues raised by the parties are now addressed beginning with the submission on the applicability of the doctrine of *res judicata*. It was submitted that the instant judicial review proceeding was an abuse of the process of the court since it was caught by *res judicata*. The applicant is said to be seeking the same order that the Court of Appeal declined to make, *ie*, to make the requisite adjustment and payment of pension arrears. It was pointed out that the applicant's order was framed in the 2017 originating summons as follows:

> [A] Adjustments be made retrospectively to the pensions received by the recipients whose pensions had been calculated based on the post 1.1.2013 formula, and any shortfall resulting therefrom be paid to the respective recipients accordingly.

[28] The Court of Appeal's decision was as follows:

> [49] We however, decline to make any order for retrospective adjustments to be made to pensions paid and for any shortfall to be paid to the appellant on the ground that it has not been proven that any actual loss has been suffered by the appellant. This was the finding of fact by the

learned judge and in respect of which we find no appealable error. In addition, no specific mention was made of this issue in the memorandum of appeal and this issue was not submitted by learned counsel for the appellant; neither in his written submissions nor his oral submissions.

[29] The Government and the Director General then referred to the following established principles on *res judicata* to support their submission:

(i) the plea of *res judicata* applies, except in special cases, not only to point upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time (*Chemfert Sdn Bhd & Anor v. Lim Hua* [2010] 7 CLJ 491; [2010] 5 MLJ 228); and

(ii) *res judicata* for this purpose is therefore not confined to the issues which the court is actually asked to decide, but covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. (*Chemfert Sdn Bhd*, *supra*).

[30] Having considered the issue, I hold the matter was not *res judicata* for the following reasons. The main relief sought in the 2017 originating summons was the validity or constitutionality of ss. 3 and 7 of the 2013 Amendment Act. The relief the Court of Appeal declined to make was the retrospective adjustments and shortfall which was said not to be proven by the applicant. A close reading of the judgment reveals that what was not proven was whether there was an actual loss in pensions after the impugned amendments for the main relief to be granted. The High Court nor the Court of Appeal had made a finding on the actual pension adjustment of the applicant.

[31] Secondly, in the 2017 originating summons, *mandamus* was not an issue nor was it determined by the courts. The issue before me now is whether *mandamus* was a point which properly belonged to the subject of litigation and which the applicants, exercising reasonable diligence, might have brought in the 2017 originating summons.

[32] It is clear as day that the criteria for claiming the remedy of *mandamus* had not materialised at the time the 2017 originating summons was brought. At that time the amendments *vide* ss. 3 and 7 of the 2013 Amendment Act were yet to be declared invalid. It was only after the said amendments were declared invalid and the original provisions restored that the applicant could make a demand to the Director General to make the necessary adjustments to her pension. Then, it is only when the Director General refuses to do so that the criteria for seeking the remedy for *mandamus* crystallises.

[33] Thus, it was not competent for the applicants to seek the remedy of *mandamus* in the 2017 originating summons. The remedy was then not available to the applicant. In the circumstances, I hold that the instant judicial review application is not an abuse of the process of the court and that the applicant is entitled to claim the remedy of *mandamus*.

Whether The Mandamus Order Sought Ought To Be Issued

[34] The PAA 1980 is clear. Its purpose, amongst others, is for the adjustment of pensions. Section 3 states that pensions are to be adjusted in accordance with the provisions of the PAA 1980 and the adjusted pension is payable with effect from the date of implementation of the current salary scale. The phrase "current salary scale" is defined in s. 2 of the PAA 1980 to mean the latest scale which is applicable to officers of the public service to whom a revision of salaries is from time to time made by the Government.

[35] The decision of the Federal Court in the earlier case, *ie*, the appeal against the decision of the Court of Appeal concerning the 2017 originating summons, is now reported as *The Government Of Malaysia & Anor v. Aminah Ahmad* [2023] 8 CLJ 1. The Federal Court, after considering ss. 3 and 6 of the PAA 1980, propounded the principle of pension adjustment in the following paragraphs:

> [28] It is pertinent to note here that prior to the 2013 Amendment Act, pensions under the PAA 1980 were adjusted whenever there was a revision or adjustment of salary for serving government employees in the public services.
>
> [33] Under the old scheme, the amount of pensions receivable by a pensioner would correspondingly increase whenever there is a salary revision for public officer, provided the pensioner and public officer are of the same grade.

[36] The decision to revise the salary of serving Government employees is with the Government. Once the funds are approved by Parliament, the implementation of the decision is made by way of a service circular. The Government and Director General submitted that the last salary revision was in 2012 and the relevant service circular for the said adjustment of salary of serving Government employees was Pekeliling Perkhidmatan Bil. 1 Tahun 2012. The amount of pension received by the applicant was correspondingly in line with the said salary revision.

[37] The applicant contended that thereafter there were salary revisions evidenced in three other service circulars and therefore a corresponding pension adjustment must be made and paid out to her. The service circulars identified by the applicant are: (i) Pekeliling Perkhidmatan Bil. 2 Tahun 2013; (ii) Pekeliling Perkhidmatan Bil. 36 Tahun 2013; and (iii) Pekeliling Perkhidmatan Bil. 1 Tahun 2016 (hereinafter referred to as "the impugned circulars").

[38] It is not disputed that the Government and Director General did not make any corresponding pension adjustments as demanded by the applicant. The reason given was that there was no salary revision of serving Government employees in the impugned circulars and therefore no corresponding right to any pension adjustments arising therefrom. The Government and Director General also relied on a paragraph in each of the impugned circulars which said that the circulars did not apply to pensioners.

[39] The issue before me is whether there is a salary revision for serving Government employees in the impugned circulars, given that, it is only through the impugned circulars one will know whether there was a salary revision for serving Government employees. This fact is crucial, considering that any pension adjustment under the PAA 1980 is made correspondingly with a salary revision. As such the impugned circulars must be scrutinised carefully to determine whether there was in fact a salary revision as claimed by the applicant.

[40] The last salary revision was made in 2012 and this is reflected in Pekeliling Perkhidmatan Bil. 1 Tahun 2012. Parties are on common ground that this service circular reveals a salary revision. It is pertinent, to therefore, reproduce the relevant parts of the service circular since it set out the purpose, principle, and manner of a salary revision:

> Kenaikan Gaji Pegawai Perkhidmatan Awam Persekutuan Di Bawah Sistem Saraan Malaysia Tujuan
>
> 1. Pekeliling perkhidmatan ini bertujuan untuk melaksanakan keputusan Kerajaan sebagaimana diumumkan pada 8 Mac 2012 mengenai kenaikan gaji sebanyak 13% berdasarkan gaji Sistem Saraan Malaysia (SSM) dengan Kenaikan Gaji Tahunan (KGT) antara RM80.00 hingga RM320.00 kepada pegawai dalam Kumpulan Pengurusan dan Profesional, serta Kumpulan Pelaksana. Bagi pegawai dalam Kumpulan Pengurusan Tertinggi, kenaikan gaji diberi sebanyak 7% hingga 9% dengan KGT berdasarkan pelarasan peratusan yang ditetapkan.
>
> Struktur Gaji Minimum - Maksimum
>
> 8. Jadual Gaji Sebaris bagi Kumpulan Pengurusan Tertinggi dan Jadual Gaji Matriks bagi Kumpulan Pengurusan dan Profesional, serta Kumpulan Pelaksana yang berkuat kuasa sehingga 31 Disember 2011 adalah digantikan dengan Jadual Gaji Minimum - Maksimum (JGMM). JGMM adalah di Lampiran A.
>
> Prinsip Pemberian Kenaikan Gaji
>
> 9. Prinsip pemberian kenaikan gaji adalah berdasarkan gaji hakiki pegawai pada 31 Disember 2011 dan ditambah dengan kadar peratusan kenaikan gaji mengikut gred.

Kaedah Pemindahan Gaji

10. Bagi maksud pemindahan gaji sebagai amaun gaji baru dalam JGMM pada 1 Januari 2012, gaji hakiki pegawai pada 31 Disember 2011 ditambah dengan kadar peratusan kenaikan gaji yang ditetapkan mengikut gred seperti di Jadual 1.

Jadual 1:

Kadar Peratusan Kenaikan Gaji Mengikut Gred dan Kumpulan Perkhidmatan Kumpulan Perkhidmatan

Kumpulan Perkhidmatan	Gred Gaji	Kadar Kenaikan Gaji
Pengurusan Tertinggi	VU1	7%
	VU2 dan setaraf	8%
	VU3, VU4 dan setaraf	9%
	VU7-VU5 dan setaraf	
Pengurusan dan Professional	Gred 41-54 dan setaraf	13%
Pelaksana	Gred 1-40 dan setaraf	13%

[41] Pekeliling Perkhidmatan Bil. 1 Tahun 2012 clearly shows that there was a revision of salary for serving Government employees and as a result, the amount of pension receivable by a pensioner would have to be correspondingly increased. This was done and is not an issue before me.

[42] I now have to scrutinise the impugned service circulars relied by the applicant to determine whether any one of them concern a salary revision or something else. The first is Pekeliling Perkhidmatan Bil. 2 Tahun 2013 which provides as follows:

Penambahbaikan Jadual Gaji Minimum - Maksimum
Bagi Pegawai Perkhidmatan Awam Persekutuan
Di Bawah Sistem Saraan Malaysia

Tujuan

1. Pekeliling Perkhidmatan ini bertujuan melaksanakan keputusan Kerajaan mengenai penambahbaikan struktur Jadual Gaji Minimum - Maksimum (JGMM) bagi pegawai Perkhidmatan Awam Persekutuan di bawah Sistem Saraan Malaysia (SSM).

2. Selaras dengan hasrat bagi meningkatkan produktiviti kerja penjawat awam, Kerajaan bersetuju menambah baik struktur JGMM bagi Kumpulan Pelaksana, Kumpulan Pengurusan dan Profesional serta Kumpulan Pengurusan Tertinggi di bawah SSM 2012.

Penambahbaikan Struktur JGMM

3. Struktur JGMM sedia ada ditambah baik seperti berikut:

3.1 Peringkat gaji (P) bagi Kumpulan Pelaksana dan, Kumpulan Pengurusan dan Profesional dijadikan satu lapisan jadual gaji minimum-maksimum yang baru dengan melibatkan penggabungan:

a. Peringkat gaji P1, P2 dan P3 di gred lantikan.

b. Peringkat gaji P1 dan P2 di gred kenaikan pangkat.

3.2 gaji maksimum JGMM bagi semua Kumpulan Perkhidmatan ditambah Kenaikan Gaji Tahunan (KGT) sebanyak tiga (3) KGT untuk membolehkan pegawai menikmati Pergerakan Gaji Tahunan (PGT).

8. Bagi maksud pemindahan gaji dalam penambahbaikan struktur JGMM ini, gaji pegawai pada 31 Disember 2012 hendaklah dipindahkan sebagai amaun gaji yang sama dalam JGMM baru pada 1 Januari 2013 termasuk bagi pegawai yang berada dalam keadaan seperti berikut:

[43] It is clear that the service circular is concerned with the enhancement towards the structure of the salary scale without altering the salary that is being paid to a serving Government employee. This service circular also has nothing to do with a salary revision. It is merely an improvement by increasing the Jadual Gaji Minimum - Maksimum, abbreviated as JGMM.

[44] The second is Pekeliling Perkhidmatan Bil. 36 Tahun 2013 which provides as follows:

Penambahbaikan Jadual Gaji Minimum - Maksimum Gred 1 Hingga Gred 54 Di Bawah Sistem Saraan Malaysia

Tujuan

1. Pekeliling Perkhidmatan ini bertujuan melaksanakan keputusan Kerajaan mengenai penambahbaikan struktur Jadual Gaji Minimum - Maksimum (JGMM) bagi Gred 1 hingga Gred 54 di bawah Sistem Saraan Malaysia (SSM).

5. Struktur JGMM bagi Gred 1 hingga Gred 40 dalam Kumpulan Pelaksana serta Gred 41 hingga Gred 54 dalam Kumpulan Pengurusan dan Profesional ditambah baik berdasarkan prinsip berikut:

5.1 Penambahbaikan struktur gaji mengikut prinsip kadar upah mengikut kerja dan kelayakan masuk yang diperlukan, serta prinsip relativiti dan pariti.

A 5.2 Gaji maksimum tertentu dalam JGMM diperkemas bagi menampung prinsip penetapan gaji permulaan kenaikan pangkat. Seterusnya, gaji maksimum ditambah sebanyak dua (2) Kenaikan Gaji Tahunan (KGT) bagi membolehkan pegawai menikmati Pergerakan Gaji Tahunan (PGT).

B 5.3 Amaun gaji minimum dan maximum dalam JGMM dibundarkan. Peringkat gaji (P) bagi Kumpulan Pelaksana dan, Kumpulan Pengurusan dan Profesional dijadikan satu lapisan jadual gaji minimum-maksimum yang baru dengan melibatkan penggabungan:

C 7. JGMM bagi pegawai yang berada dalam skim perkhidmatan yang berkuat kuasa adalah seperti di Lampiran A.

8. Dalam keadaan menampung pegawai yang berada dalam skim perkhidmatan tertentu yang telah dijumudkan, JGMM adalah seperti di Lampiran A.

D 13. Bagi maksud pemindahan gaji, amaun gaji pegawai pada 31 Oktober 2013 hendaklah dipindahkan kepada amaun gaji yang sama dalam JGMM baru pada 1 November 2013. Kaedah pemindahan gaji yang sama adalah juga terpakai bagi pegawai yang berada dalam keadaan seperti berikut: ...

[45] The purpose of Pekeliling Perkhidmatan Bil. 36 Tahun 2013 is the E same as Pekeliling Perkhidmatan Bil. 2 Tahun 2013 namely, for the enhancement of the structure of the salary scale without altering the salary that is being paid to a serving Government employee. It concerns certain grades Grade 1 to Grade 40 and Grade 41 to Grade 54 and the consolidated schemes of service. Most importantly, is the fact that this service circular has nothing to do with a salary revision. It is merely an improvement taking into F account the consolidated schemes of service and increasing the JGMM.

[46] The third is Pekeliling Perkhidmatan Bil. 1 Tahun 2016 which provides as follows:

Rasionalisasi Skim Perkhidmatan Bagi Perkhidmatan
G Awam Persekutuan Di Bawah Sistem Saraan Malaysia

Tujuan

1. Pekeliling Perkhidmatan ini bertujuan untuk memaklum dan melaksanakan keputusan Kerajaan mengenai rasionalisasi skim perkhidmatan bagi Perkhidmatan Awam Persekutuan di bawah Sistem H Saraan Malaysia (SSM).

2. Sejajar dengan Transformasi Perkhidmatan Awam dalam memastikan Perkhidmatan Awam mempunyai modal insan yang kompeten untuk merealisasikan wawasan negara, maka rasionalisasi skim perkhidmatan dilaksanakan oleh Kerajaan. Rasionalisasi ini adalah untuk I memperkemaskan pengurusan skim perkhidmatan bagi menarik dan mengekal modal insan terbaik, mewujudkan fleksibiliti dalam urusan perkhidmatan, menambah baik mobiliti dan kemajuan kerjaya dan

mengemas kini syarat lantikan supaya relevan dengan keperluan semasa. Urusan rasionalisasi ini juga bertujuan untuk memperluaskan peluang pemegang kelayakan kemahiran untuk berkhidmat dalam Perkhidmatan Awam dengan memasukkan kelayakan pendidikan Teknikal dan Latihan Vokasional (TVET) dalam skim perkhidmatan tertentu. Hasil kajian menyeluruh terhadap ke semua 252 skim perkhidmatan yang sedang berkuat kuasa, terdapat skim-skim perkhidmatan yang ditambah baik, dijumud dan dimansuhkan. Terdapat juga skim perkhidmatan yang dikekalkan kerana masih relevan dan menepati keperluan perkhidmatan. Ini menjadikan jumlah skim perkhidmatan pada tarikh kuat kuasa Pekeliling Perkhidmatan ini adalah sebanyak 240 skim perkhidmatan.

3. Selaras dengan langkah-langkah rasionalisasi skim perkhidmatan ini, Kerajaan turut bersetuju menetapkan Gaji Permulaan Terendah (GPT) dalam Perkhidmatan Awam pada RM1,200 sebulan dan penambahbaikan Jadual Gaji Minimum-Maksimum (JGMM). Pegawai awam turut menerima faedah pemindahan gaji bersamaan satu (1) Kenaikan Gaji Tahunan (KGT) kecuali yang terlibat dalam pemindahan ke gaji permulaan yang baharu di JGMM baharu.

4. Dalam Pekeliling Perkhidmatan ini - 'Gaji baharu' bermaksud gaji pegawai setelah diberi Pergerakan Gaji Tahunan (PGT) 2016 dan diberi faedah pemindahan gaji bersamaan satu (1) KGT atau diselaraskan kepada gaji permulaan di JGMM baharu;

[47] The Government and Director General submit that Pekeliling Perkhidmatan Bil. 1 Tahun 2016 concerns improvements carried out towards the schemes of service. I agree the service circular does that with one important caveat discussed below. For completeness, the submission of the Government and Director General are set out below.

[48] It was also submitted that "Pergerakan Gaji Tahunan" ("PGT") is an element of salary increment which had been present since the inception of public service whereby it is granted yearly to serving officers. The PGT is derived by adding the salary and the KGT subject to not exceeding the JGMM and the decision of the Human Resources Development Panel of the department concerned.

[49] It was further submitted that the KGT is based on the principles of salary where it is based on the rate for the job, relativity and parity, fair comparison with the same type of work in the market whereby the KGT would be granted to deserving officers based on their performance, achieving annual work targets and subject to assessment by Human Resources Development Panel.

[50] For the above reasons the Government and Director General submitted that there was no salary revision *vide* the impugned service circulars. The said service circulars also clearly state that they do not apply to pensioners.

[51] It is pertinent to remember, as alluded to above, that the enabling statute for adjustment of pensions is the PAA 1980 and not the service circulars (see the decision of the Federal Court in *The Government Of Malaysia & Anor v. Aminah Ahmad*). But, as also shown above, the only evidence of whether there is or is not a salary revision would be the service circulars which would tell us whether there is or is not a salary revision for serving Government employees.

[52] I now come to the heart of the matter – whether there was a salary revision in any or all of the impugned service circulars. I have carefully examined each service circular. I agree that Pekeliling Perkhidmatan Bil. 2 Tahun 2013 and Pekeliling Perkhidmatan Bil. 36 Tahun 2013 are enhancements of the structure of the salary scale without altering the salary that is being paid to a serving Government employee. There is merely an enlargement of the JGMM among other improvements none of which gives rise to a salary revision. Therefore, the reliance on these two service circulars by the applicant is misconceived in law.

[53] However, I disagree that Pekeliling Perkhidmatan Bil. Tahun 2016 concerns only improvements carried out towards the schemes of service. Hidden amongst all the various improvements and enhancement is a present by the Government to serving Government employees of a salary adjustment in the following words: Pegawai awam turut menerima faedah pemindahan gaji bersamaan satu (1) Kenaikan Gaji Tahunan (KGT) kecuali yang terlibat dalam pemindahan ke gaji permulaan yang baharu di JGMM baharu.

[54] The words menerima faedah pemindahan gaji bersamaan satu (1) Kenaikan Gaji Tahunan (KGT) are not dependant on the decision of the Human Resource Development Panel or on work performance. The one KGT is given without conditions and is for all intent and purposes a revision of salary. When serving Government employees receive such an adjustment of salary it is inconceivable that pensioners are not accorded a corresponding adjustment so as to increase their pensions.

Conclusion

[55] From the above analysis, I hold as follows:

(i) Pekeliling Perkhidmatan Bil. 2 Tahun 2013 and Pekeliling Perkhidmatan Bil. 36 Tahun 2013 does not concern a salary revision and

(ii) Pekeliling Perkhidmatan Bil. 1 Tahun 2016 concerns a salary revision, specifically, one KGT.

[56] In the circumstances:

(i) an order of *mandamus* is granted compelling the Director General to make the necessary corresponding adjustments of one KGT for the purpose of computing the pension in favour of entitled pensioners under ss. 3 and 6 of the PAA 1980;

(ii) in view of the decision of the Federal Court in *The Government Of Malaysia & Anor v. Aminah Ahmad* (*supra*) the back-dated pension is to be paid beginning January 2022 until the next salary revision;

(iii) the payment of back-dated pension is to be paid to the entitled pensioners within three months from today; and

(iv) there is no order as to costs.